92-26

No. _____

Supreme Court, U.S.
FILED
JUL 1 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

ELDON S. REED,

Petitioner,

v.

VICTORIA C. DRUMMOND,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Bankruptcy Code excludes from the bankruptcy estate property of a debtor that is subject to a restriction on transfer enforceable under "applicable nonbankruptcy law." 11 U.S.C. § 541(c)(2). The issue is whether an anti-alienation provision contained in an ERISA-qualified pension plan constitutes a restriction on transfer enforceable under "applicable nonbankruptcy law," and whether, accordingly, a debtor may exclude his or her interest in such a plan from the property of a bankruptcy estate.

LIST OF PARTIES

The parties are the Petitioner, Eldon S. Reed, a debtor in bankruptcy, and Respondent, Victoria C. Drummond, the Trustee in the bankrupcty of Eldon S. Reed.

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ELDON S. REED,

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VICTORIA C. DRUMMOND,

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Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Eldon S. Reed, respectfully, requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled proceeding on December 11, 1991. The Petition for Rehearing was denied on April 2, 1992.

DISCUSSIONS AND OPINIONS OF LOWER COURTS

On October 2, 1989, the United States Bankruptcy Court for the District of Arizona entered a minute entry order in this proceeding. The minute entry order has not

been reported, but is reprinted in the Appendix hereto at p. 1a. Subsequently, the United States Bankruptcy Court for the District of Arizona entered a Judgment on October 25, 1989. This Judgment has not been reported, but is reprinted in the Appendix hereto at p. 3a.

The Judgment and Order of the United States District Court for the District of Arizona dated May 24, 1990 have not been reported, but are reprinted in the Appendix hereto at p. 6a.

The Opinion of the Court of Appeals for the Ninth Circuit is reported at 915 F.2d 1046, and is reprinted in the Appendix hereto at p. 10a. The United States Court of Appeals for the Ninth Circuit's Order dated April 2, 1992 denying Petitioner's Motion for Order Staying Any Further Action On its Petition for Rehearing until this Court decided the case of *Patterson v. Shumate* and denying Petitioner's Petition for Rehearing has not been reported, but is reprinted in the Appendix hereto at p. 22a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its opinion on December 11, 1991. The Petitioner filed a Petition for Rehearing and Suggestion for Rehearing en banc on December 23, 1991. The Petition for Rehearing was denied, and the suggestion for rehearing en banc rejected, in an Order by the United States Court of Appeals for the Ninth Circuit filed April 2, 1992.

The jurisdiction of this Court to review the judgment of the United States Circuit of Appeals for the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. 11 U.S.C. § 541, which is reprinted in the Appendix hereto at p. 34a.

2. 29 U.S.C. § 1144(d) (ERISA § 206(d)(1)) which provides:

> (d)(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

STATEMENT OF THE CASE

The Petitioner, Eldon S. Reed, filed his bankruptcy petition on May 20, 1988. He was a participant in an employer-sponsored pension plan which was qualified pursuant to ERISA and the Internal Revenue Code. In his Schedule of Assets filed with the United States Bankruptcy Court for the District of Arizona (the "Arizona Bankruptcy Court"), Petitioner claimed an exemption for all of his retirement benefits in the pension plan.

The Respondent, Victoria C. Drummond, the bankruptcy trustee, filed an objection to Petitioner's claim for an exemption of his retirement benefits. The matter was heard by the Arizona Bankruptcy Court on October 2, 1989. The Arizona Bankruptcy Court decided against the

Petitioner and in favor of the bankruptcy trustee shortly thereafter.

The Petitioner appealed the Arizona Bankruptcy Court decision to the United States District Court for the District of Arizona (the "Arizona District Court"). The Arizona District Court affirmed the Arizona Bankruptcy Court decision and the Petitioner appealed to the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit").

The Ninth Circuit affirmed the Arizona District Court and the Arizona Bankruptcy Court decisions on December 11, 1991. The Petitioner then filed a Petition for Rehearing and Suggestion for Rehearing *en banc* (the "Petition for Rehearing") with the Ninth Circuit on December 23, 1991. A copy of the Petition for Rehearing is reprinted in the Appendix hereto on p. 23a.

Subsequent to the filing of the Petition for Rehearing, Petitioner learned that this Court accepted a petition on Writ for Certiorari to the United States Court of Appeals for the Fourth Circuit in *Patterson v. Shumate,* 112 S. Ct. 2242 (1992), (hereinafter *"Patterson v. Shumate"*). Petitioner also learned that a different panel of the Ninth Circuit considering a similar petition for rehearing involving issues the same as the issues in Petitioner's case, filed an order on its own action suspending further action on its case until this Court decided *Patterson v. Shumate.* A copy of this Order in Ninth Circuit No. 90-15252, entitled *Pitrat v. Garlikov,* is reprinted in the Appendix hereto at p. 29a.

Petitioner thereupon filed a Motion for Order Staying Any Further Action on Appellant's Petition for Rehearing

and Suggestion for Rehearing *en banc* (the "Stay Motion") with the Ninth Circuit on March 9, 1992. The Stay Motion requested the Ninth Circuit to stay any further action on Petitioner's Petition for Rehearing until this Court decided the *Patterson v. Shumate* case. Petitioner also explained that the *Patterson v. Shumate* case involved the same issues pending before the Ninth Circuit in the Petition for Rehearing. A copy of the Stay Motion is reprinted in the Appendix hereto at p. 31a.

Petitioner then filed a Motion for Leave to File *Amicus* Brief by *Amicus Curiae,* Eldon S. Reed (the "Motion") along with a Brief by *Amicus Curiae,* Eldon S. Reed In Support of Respondent with this Court on March 31, 1992. This Court subsequently granted Petitioner's Motion.

While *Patterson v. Shumate* was pending before this Court, the Ninth Circuit filed an order denying Petitioner's Stay Motion and Petition for Rehearing.

On June 15, 1992, this Court issued its decision in *Patterson v. Shumate,* holding that the anti-alienation provision in an ERISA-qualified pension plan constitutes an enforceable restriction on transfer under 11 U.S.C. § 541(c)(2).

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision that "applicable nonbankruptcy law" is limited to state spendthrift trust law and does not include ERISA is in direct conflict with this Court's decision in *Patterson v. Shumate* decided on June 15, 1992; thus the Ninth Circuit's opinion in this case should be reversed.

Since this Court has already decided the legal issue posed by this Petition for Writ of Certiorari, the argument is brief.

The Bankruptcy Code excludes from the bankruptcy estate property of a debtor that is subject to a restriction on transfer enforceable under "applicable nonbankruptcy law." 11 U.S.C. § 541(c)(2). The issue which was before the Ninth Circuit and this Court was whether an anti-alienation provision contained in an ERISA-qualified pension plan constitutes a restriction on transfer enforceable under "applicable nonbankruptcy law," and whether, accordingly, a debtor may exclude his interest in such a plan from the property of the bankruptcy estate.

The Ninth Circuit in this case, *In re Reed*, 951 F.2d 1046 (9th Cir. 1991), ruled that an anti-alienation provision in an ERISA-qualified pension plan in and of itself did not constitute a restriction on transfer enforceable under "applicable nonbankruptcy law" and that such a term referred only to state spendthrift trust law. Therefore, a debtor's interest in such a plan is includable in a debtor's bankruptcy estate unless state spendthrift trust law applies.

The Ninth Circuit's decision in this case is in direct conflict with this Court's decision in *Patterson v. Shumate*.

In *Patterson v. Shumate,* this Court held that an anti-alienation provision contained in an ERISA-qualified pension plan constitutes a restriction on transfer enforceable under "applicable nonbankruptcy law" and, accordingly, a debtor may exclude his or her interest in such a plan from the property of the bankruptcy estate. This Court refused to limit "applicable nonbankruptcy law" to state spendthrift trust law.

The Ninth Circuit refused to stay Petitioner's Petition for Rehearing even though it knew that the same issues before it were pending before this Court and that there was a significant split in the Circuits on this issue. The Ninth Circuit's actions leave Petitioner with no other option but to file this Petition and request this Court to accept the Writ for Certiorari and summarily reverse the Ninth Circuit decision which is in direct conflict with this Court's decision in *Patterson v. Shumate.*

CONCLUSION

As discussed above, Petitioner requests that this Court accept its Petition for Writ of Certiorari, summarily reverse the Ninth Circuit's opinion in this case which is in direct conflict with this Court's decision in *Patterson v. Shumate,* and remand this case to the Ninth Circuit for reconsideration in light of *Patterson v. Shumate.*

Respectfully submitted,

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APPENDIX

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA
MINUTES

BANKRUPTCY JUDGE: ROBERT G. MOOREMAN
CLERK: JANET SMITH
COURT REPORTER: Kelly Yetter
NO./ADV.NO.: 88-3890 PHX RGM

NAME: ELDON REED

SUBJECT OF HEARING: TRUSTEE'S MOTION FOR SUMMARY JUDGMENT

DATE/TIME: OCTOBER 2, 1989 AT 11:15 A.M., HEARING ROOM 1

APPEARANCES:

Cathy Reece, Atty Debtor
Alisa Lacey/Charles Lowe, Attys Trustee

PROCEEDINGS:

Ms. Lacey urged the motion for summary judgment and put her argument on the record.

Ms. Reece argued against the motion for summary judgment citing cases which support her position.

COURT: IT IS ORDERED taking this matter under advisement.

5:00 P.M. UNDER ADVISEMENT RULING

The Court having had under advisement the trustees motion for summary judgment on Erisa issues and claims on the $800,000.00 pension plan and after due consideration thereof and the record presented, the Court finds

that there are no material disputed facts and that the trustee is entitled to judgment as a matter of law, based upon substantial authority in this area although the Ninth Circuit Court of Appeals and or the U.S. Supreme Court will have the final word.

IT IS THEREFORE ORDERED granting the trustee's motion and the trustee is directed to lodge a form of judgment consistent herewith, forthwith which shall be the final appealable order in this case.

/s/ Robert G. Mooreman
Robert G. Mooreman

(Filed Oct. 2, 1989)

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(602) 253-2882

Attorneys for Victoria C. Drummond

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re	Chapter 7 Proceedings
ELDON S. REED,	Case No. B-88-3890-PHX-RGM
Debtor.	JUDGMENT
	(Filed Oct. 25, 1989)

On October 12, 1988, Trustee Victoria Drummond filed an Objection to Debtor's Claim of Exemption to Retirement Benefits in the Affiliated Anesthesiologists, Limited Pension Plan and Smith Barney Personal Individual Retirement Account totalling approximately $802,150.00. On June 23, 1989, Trustee filed her Motion for Summary Judgment requesting that Trustee's Objection be sustained with respect to Debtor's Claim of Exemption of the pension plan and retirement account. Debtor cross moved for summary judgment on August 1, 1989. On October 2, 1989, oral argument was held on Trustee's Motion for Summary Judgment and on Debtor's Cross-Motion for Summary Judgment. Alisa Lacey presented argument on behalf of Trustee, and Cathy Reece, Special

Counsel to Debtor, presented argument on behalf of Debtor. The Court having found that there are no material disputed facts and that the Trustee is entitled to Judgment as a matter of law by Order dated October 2, 1989.

IT IS HEREBY ORDERED granting the Trustee's Motion for Summary Judgment and denying Debtor Eldon Reed's Cross-Motion for Summary Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

1. That the Affiliated Anesthesiologists, Limited Pension Plan does not qualify as a spendthrift trust under Arizona law and therefore, said pension plan is included as an asset of the bankruptcy estate of the Debtor under 11 U.S.C. §541;

2. That Ariz. Rev. Stat. Ann. §33-1126(B) does not exempt the Debtor's retirement benefit in the Affiliated Anesthesiologists, Limited Pension Plan because such state exemption is preempted by 29 U.S.C. §1144(a) (ERISA Section 514(a)); and

3. That 29 U.S.C. §1056(d) (ERISA Section 206(d)(1)) does not exempt the Debtor's retirement benefits in the Affiliated Anesthesiologists, Limited Pension Plan as such statutory provision of ERISA does not constitute "other federal law" under 11 U.S.C. §522(b)(2)(A).

IT IS FURTHER ORDERED that the Court finds no just reason for delay in the entry of this Judgment and the Clerk is directed to enter this Judgment forthwith pursuant to Federal Rule of Procedure 54(b).

DATED this 25 day of Oct., 1989.

/s/ Robert G. Mooreman
ROBERT G. MOOREMAN
U.S. Bankruptcy Court Judge

Copy of the foregoing mailed this
26th day of October, 1989, to:

Alisa C. Lacey, Esq.
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Victoria C. Drummond
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Phoenix, AZ 85080-3467

/s/ P. Dank
Deputy Clerk

JUDGMENT ON DECISION BY THE COURT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

In Re Eldon S. Reed, Debtor,	
Eldon S. Reed, Appellant, vs Victoria Drummond, Trustee, Appellee.	CIV-90-0013 PHX RCB (BK 88-3890 PHX RGM) JUDGMENT (Filed May 24, 1990)

This action came on for hearing before the Court, the Honorable Robert C. Broomfield, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED affirming the decision of the Bankruptcy Court granting appellee's motion for summary judgment.

DATED at Phoenix, Arizona, this 24th day of May, 1990.

RICHARD H. WEARE, CLERK

By: Ana M. Bacon
Deputy Clerk

UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

In Re ELDON S. REED, Debtor,	
ELDON S. REED, Appellant, vs VICTORIA DRUMMOND, Trustee, Appellee.	No. CIV-90-0013 PHX RCB BK 88-3890 PHX RGM ORDER (Filed May 24, 1990)

The debtor, Eldon S. Reed, appeals a ruling of the bankruptcy court which granted summary judgment in favor of the trustee on the issue of whether debtor may claim an exemption from the bankruptcy estate for his interest in a qualified pension benefit plan pursuant to 11 U.S.C. § 522(b) and Arizona Revised Statutes § 33-1126(B).

Reed filed a voluntary petition under Chapter 7 of the Bankruptcy Code on May 20, 1988. By amendment to his Schedules of Assets dated June 24, 2988 [sic], Reed claimed an exemption pursuant to A.R.S. § 33-1126 for a pension benefit plan in the amount of approximately $800,000.00 from Affiliated Anesthesiologists, Ltd. Money Purchase Pension Plan. Reed is a physician who is the

100% shareholder of Affiliated Anesthesiologists, Ltd. and Trustee and sole beneficiary of its Pension Plan.

On October 12, 1988, Victoria Drummond, the Trustee, filed an objection to Reed's claim for exemption of his Pension Plan. The Trustee filed a motion for summary judgment and Reed filed a cross-motion for summary judgment. The Bankruptcy Court entered a written Minute Entry Order on October 2, 1989, granting the Trustee's motion for summary judgment and denying Reed's cross-motion for summary judgment. Judgment was entered on October 25, 1989. Thereafter, Reed filed the instant appeal.

The Bankruptcy Court based it [sic] ruling on the following grounds:

> 1. That the Affiliated Anesthesiologists, Limited Pension Plan does not qualify as a spendthrift trust under Arizona law and therefore, said pension plan is included as an asset of the bankruptcy estate of the Debtor under 11 U.S.C. § 541;
>
> 2. That Ariz. Rev. Stat. Ann. § 33-1126(B) does not exempt the Debtor's retirement benefit in the Affiliated Anesthesiologists, Limited Pension Plan because such state exemption is preempted by 29 U.S.C. § 1144(a) (ERISA Section 514(a); and
>
> 3. That 29 U.S.C. § 1056(d) ERISA (Section 206(d)(1)) does not exempt the Debtor's retirement benefits in the Affiliated Anesthesiologists, Limited Pension Plan as such statutory provision of ERISA does not constitute "other federal law" under 11 U.S.C. § 522(b)(2)(A).

The Bankruptcy Court issued these findings based on prior rulings from this district and circuit. *See In re Siegel,* 105 B.R. 556 (D.Ariz. 1989); *In re Daniel,* 771 F.2d 1352 (9th Cir. 1985). Appellant Reed relies chiefly on an opinion by the Bankruptcy Court for the Western District of Texas which held that a pension plan subject to ERISA regulation qualified for exemption under the "other federal law" rubric of the Bankruptcy Code. *See In re Komet,* 104 B.R. 799 (Bkrtcy.W.D.Tex. 1989).

After review of the briefs and exhibits submitted by both parties and following oral argument in this matter, the Court declines appellant's invitation to follow the *Komet* case and instead will affirm the ruling of the Bankruptcy Court which is based on prior decisions of this district and circuit.

IT IS ORDERED affirming the decision of the Bankruptcy Court granting appellee's motion for summary judgment.

DATED this 14 day of May, 1990.

/s/ Robert C. Broomfield
Robert C. Broomfield
United States District Judge

Copies to all counsel of record

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re ELDON S. REED, *Debtor.*	No. 90-15874
ELDON S. REED, *Appellant,* v. VICTORIA C. DRUMMOND, *Appellee.*	D.C. Nos. CIV-90-0013 PHX RCB BK-88-3890 PHX RGM
	OPINION

Appeal from the United States District Court
for the District of Arizona
Robert C. Broomfield, District Judge, Presiding

Argued and Submitted
August 19, 1991 – San Francisco, California

Filed December 11, 1991

Before: Dorothy W. Nelson, Cynthia Holcomb Hall and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge D.W. Nelson

SUMMARY

Bankruptcy/ERISA

Affirming a district court judgment upholding a decision of the Bankruptcy Court, the court of appeals held that an ERISA qualified pension plan was not exempt from a bankruptcy estate.

Appellant Eldon S. Reed filed for Chapter 7 protection and sought to exclude his ERISA qualified pension plan from his bankruptcy estate. The bankruptcy court granted the bankruptcy trustee's motion for summary judgment, holding that the pension plan was not exempt from the debtor's estate. Reed argued that his plan was exempt under both Arizona law and Bankruptcy Code § 522(b)(2)(A), as well as excluded under Bankruptcy Code § 541(c)(2).

[1] In determining whether a state statute is preempted by ERISA, the general rule is that a state law relates to an ERISA plan and is thus preempted if it singles out an ERISA plan or if it has a connection with or reference to such a plan. **[2]** Because Arizona law indirectly makes reference ERISA plans through their Internal Revenue Code section numbers, the court found that it was sufficiently "related to" an ERISA plan to fall within the ambit of ERISA preemption.

[3] Bankruptcy Code § 522(b)(2)(A) did not exempt the pension plan as property exempt under federal law under ERISA's anti-alienation provision. **[4]** That section

simply did not "federalize" the Arizona statute in question so as to save it from ERISA preemption.

[5] The court disagreed with Reed's argument that he was entitled to exclude his retirement plan under Bankruptcy Code § 541(c)(2) because ERISA qualifies as "applicable nonbankruptcy law" and his plan was a valid spendthrift trust. [6] In accord with the majority position and the current law of the Ninth Circuit, the court continued to hold that "applicable nonbankruptcy law" does not refer to ERISA. [7] The court also rejected Reed's argument that his ERISA plan qualified as a spendthrift trust under Arizona law because the medical corporation he worked for, of which he was the sole shareholder, rather than he, controlled the plan.

COUNSEL

Timothy Berg, Cathy L. Reece, Gary H. Ashby, Fennemore Craig, Phoenix, Arizona, for appellant.

Charles W. Lowe, Alisa C. Lacey, Davis & Lowe, Phoenix, Arizona, for appellee.

OPINION

D.W. NELSON, Circuit Judge:

Chapter 7 debtor Eldon S. Reed seeks to exclude his ERISA qualified pension plan from his bankruptcy estate. Reed appeals the district court's decision affirming the bankruptcy court's ruling that his bankruptcy estate includes his pension plan.

FACTUAL AND PROCEDURAL BACKGROUND

Debtor Reed, a physician and the sole shareholder of Affiliated Anesthesiologists, Ltd., is trustee and sole beneficiary of its pension plan. In 1988 Reed filed a voluntary petition under Chapter 7 of the Bankruptcy Code. He claimed his pension plan with Affiliated Anesthesiologists, worth approximately $800,000, as an exemption from his bankruptcy estate.

The bankruptcy Trustee, Victoria Drummond, objected to Reed's claimed exemption of the pension plan. The bankruptcy court granted the Trustee's motion for summary judgment and denied Reed's cross-motion for summary judgment on the same issue. On appeal, the district court affirmed the bankruptcy court. Reed now appeals the district court's affirmance. We affirm.

STANDARD OF REVIEW

This case concerns only the bankruptcy court's conclusions of law, subsequently affirmed by the district court. De novo review applies in this situation. *In re Careau Group*, 923 F.2d 710, 711 (9th Cir. 1991); *In re Van De Kamp's Dutch Bakeries*, 908 F.2d 517, 518 (9th Cir. 1990).

DISCUSSION

Reed wishes to shield his pension plan assets from his creditors. He advances several arguments why his ERISA qualified pension plan should not be a part of his bankruptcy estate: (1) his plan is exempt under Arizona Revised Statute § 33-1126(B), (2) his plan is exempt under Bankruptcy Code § 522(b)(2)(A), and (3) his plan is

excluded under Bankruptcy Code § 541(c)(2). Bankruptcy and district courts in Arizona have already faced this issue and these arguments several times. Each time, they have ruled that ERISA pension plans are not exempt from a debtor's estate. In so concluding, these courts have rejected every argument that Reed now asserts. *See e.g., In re Herrscher,* 121 B.R. 29 (Bankr. D. Ariz. 1989); *In re Hirsch,* 98 B.R. 1 (Bankr. D. Ariz. 1988), *aff'd, In re Siegel,* 105 B.R. 556 (Bankr. D. Ariz. 1989); *In re Flindall,* 105 B.R. 32 (Bankr. D. Ariz. 1989). Since this date this case was filed, a panel of this circuit has added its voice to this chorus, reaffirming these legal conclusions yet again. *See Pitrat v. Garlikov,* No. 90-15252 (9th Cir. Oct. 25, 1991). We discuss each of appellant's arguments below.

1. ERISA Preemption

ERISA 514(a) preempts "any and all State laws insofar as they . . . relate to any employee benefit plan" covered by ERISA. The scope of this expansive preemption provision is "as broad as its language." *Retirement Fund Trust of Plumbing v. Franchise Tax Bd.,* 909 F.2d 1266, 1274 (9th Cir. 1990). Despite this expansive preemption, Reed argues that ERISA does not preempt A.R.S. § 33-1126(B). A.R.S. § 33-1126(B) permits a debtor to exclude "a retirement plan which is qualified under [certain sections] of the United States internal revenue code of 1986" from her bankruptcy estate. Although the statute does not specifically mention ERISA, the statute's list of Internal Revenue Code sections includes sections which refer to ERISA plans.

[1] In determining whether a state statute is preempted by ERISA, "[t]he general rule is that a state law 'relates to' an ERISA plan [and is thus preempted] if it singles out an ERISA plan or 'if it has a connection with or reference to such a plan.' A 'neutral' state law of general application with a 'tangential' impact on a plan does not 'relate to' ERISA and is not preempted." *Retirement Fund Trust*, 909 F.2d at 1280-81 (citing *Mackey v. Lanier Collections Agency & Serv., Inc.*, 486 U.S. 825, 829, 838 n.12 (1988), and *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n.21 (1983)).

[2] Both the bankruptcy court and the district court relied upon *Mackey* in finding preemption. In *Mackey*, the Supreme Court considered the relationship between ERISA and two state statutes. The Court found that the first – an anti-garnishment statute that specifically mentioned ERISA – was preempted, but found that the second – a garnishment statute that did not mention ERISA but arguably affected ERISA plans – was not. A.R.S. § 33-1126(B) falls somewhere between the two statutes considered in *Mackey*: although it does not specifically single out ERISA, it presents a list of Internal Revenue Code sections that refer to some ERISA plans. The statute thus survives the "singles out test" fatal to the first statute the Supreme Court considered in *Mackey*. However, because A.R.S. § 33-2116(B) does indirectly make "reference to" ERISA plans via their Internal Revenue Code section numbers, we find that it is sufficiently "relate[d] to" an ERISA plan to fall within the ambit of ERISA preemption. *See also, In re Pruner*, 122 B.R. 459, 460-61 (Bankr. M.D. Fla. 1990) (finding Florida exemption statute which similarly referred to ERISA plans through Internal

Revenue Codes "related to" ERISA). We thus agree with the district and bankruptcy courts below and with the several other courts finding preemption in similar cases. *See Flindall* at 38; *Siegel* at 563-64; *Hirsch*, at 2.[1]

2. *Exemption under Bankruptcy Code § 522(b)(2)(A)*

[3] Bankruptcy Code § 522(b)(2)(A) exempts from bankruptcy estates "any property that is exempt under Federal law." Reed argues that ERISA's anti-alienation provision, ERISA, § 206(d)(1), constitutes such "Federal law," thereby exempting his pension plan from his bankruptcy estate. However, as we have already ruled in *Daniel v. Security Pac. Nat'l Bank*, 771 F.2d 1352, 1360-61 (9th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986), ERISA does not qualify as "other Federal law" under section 522(b)(2)(A). *See also Pitrat*, Slip Op. at 14612 (reaffirming *Daniel*); *Flindall* at 39; *In re Conroy*, 110 B.R. 492 (Bankr. D. Mont. 1990).

Reed also contends that § 522(b)(2)(A) "federalizes" – that is, elevates to the status of federal law – A.R.S. § 33-1126(B) and thus "saves" it from preemption. He argues that because § 522(b)(2)(A) permits states to accept

---

[1] Reed attempts to circumvent this conclusion by arguing that under ERISA § 514(c)(2), a state statute must first "purport to regulate" ERISA plans before it can be found to "relate to" ERISA. *See Retirement Fund Trust*, at 1281. Reed contends that because the Arizona statute does not regulate "the terms and conditions of employee benefit plans," ERISA preemption under § 514 does not apply at all. However, the Supreme Court recently rejected this argument in *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 484 (1990), characterizing it as a "misreading" of ERISA § 514(c)(2).

generic federal exemptions or "opt out" and create their own, a state that exercises this option does so pursuant to federal law such that the state law becomes "incorporated" or federalized into the Bankruptcy Code. Reed further points out that Arizona's exemptions mirror the generic federal exemptions. *Compare* A.R.S. § 33-1126(B) *with* Bankr. Code § 522(d)(10)(E)(iii). Given the similarity, Reed argues that for ERISA to preempt the state law in this instance makes little sense. *See In the matter of Nuttleman*, 117 B.R. 975, 982 (Bankr. D. Neb. 1990), *aff'd in part, rev'd in part*, 128 B.R. 254 (1991); *In re Vickers*, 116 B.R. 149 (Bankr. W.D.Mo.), *aff'd*, 126 B.R. 348 (1990).

[4] Again, the Arizona Bankruptcy and district courts have explicitly rejected Reed's argument. *See Hirsch* at 1-2; *Siegel* at 561-63; *Flindall* at 37. We agree with these courts that § 522(b)(2)(A) says nothing about federalizing the state laws that it authorizes. Bankruptcy Code § 522(b)(2)(A) simply does not "federalize" A.R.S. § 33-1126(B) so as to save it from ERISA § 514(a) preemption. We note also that state laws are subject to preemption whether or not they conflict or conform with the Congressional intent of the preempting federal law. *Mackey*, at 829 (citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985)); *In re Rosenquist*, 122 B.R. 775, 782 (Bankr. M.D. Fla. 1990); *Siegel* at 563.[2] Moreover, A.R.S. § 33-1126(B) may in fact conflict with ERISA. *See Pitrat*, Slip Op. at 14615-16.

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[2] Reed's reliance [sic] *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983), is misplaced. Preemption of the state statute in this instance does not impair the operation of the federal statutes involved, as it did in *Shaw*.

3. ERISA Exclusion Under Bankruptcy Code § 541(c)(2)

[5] Bankruptcy Code § 541(c)(2) permits the enforcement of "[a] restriction on the transfer of a beneficial interest . . . that is enforceable under applicable nonbankruptcy law." In other words, a beneficial interest that constitutes a valid spendthrift trust may be excluded from a debtor's bankruptcy estate if that interest is enforceable under "applicable nonbankruptcy law." In this case, Reed argues that he is entitled to exclude his retirement plan because ERISA qualifies as "applicable nonbankruptcy law" and his plan is a valid spendthrift trust. We disagree.

[6] As an initial matter, we have already ruled in *Daniel* that the phrase "applicable nonbankruptcy law" in Bankruptcy Code § 541(c)(2) does not include ERISA. We are aware that two circuits have relied upon the plain meaning of the words to rule otherwise. *See In re Lucas*, 924 F.2d 597 (6th Cir.), *cert. denied*, 111 S.Ct. 2275 (1991); *In re Moore*, 907 F.2d 1476 (4th Cir. 1990). However, *Daniel* is the law of this circuit and also the majority view in the nation. *See Pitrat supra; Matter of Goff*, 706 F.2d 574 (5th Cir. 1983); *In re Brooks*, 844 F.2d 258 (5th Cir. 1988) (reaffirming *Goff*); *In re Graham*, 726 F.2d 1268 (8th Cir. 1984); *In re Lichstrahl*, 750 F.2d 1488 (11th Cir. 1985); *see also Regan v. Ross*, 691 F.2d 81, 84-85 (2d Cir. 1982) (endorsing a restrictive interpretation of § 541(c)(2) vis a vis ERISA based on legislative history.)[3] In accord with the majority

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[3] It appears that the Seventh Circuit concurs as well. In *Employee Benefits Comm. v. Tabor*, 127 B.R. 194, 199 (Bankr. S.D.

(Continued on following page)

position and the current law of this circuit, we continue to hold that "applicable nonbankruptcy law" does not refer to ERISA.

We also reject Reed's argument that his ERISA plan qualifies as a spendthrift trust[4] under Arizona state law. At the time Reed filed his Chapter 7 petition, Arizona had no statutes relating to spendthrift trusts. The applicable law, therefore, is the Restatement (Second) of Trusts. *Pitrat*, Slip Op. at 14608; *Bank of Am. v. J&S Auto Repairs*, 143 Ariz. 416, 694 P.2d 246 (1985). Under Restatement § 156 (and also under Arizona's recently enacted statute regulating spendthrift trusts, A.R.S. 14-7705) the key concern in identifying a spendthrift trust is ascertaining the degree of control the debtor has over the trust. If the debtor enjoys a high degree of control, then the assets cannot constitute a valid spendthrift trust. *See Siegel* at 560; *Flindall* at 40-41; *see also In re Kaplan*, 97 B.R. 572 (Bankr. 9th Cir. 1989).

Reed argues that his pension plan is a spendthrift trust because Affiliated Anesthesiologists, rather than he,

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(Continued from previous page)

Ind. 1991), the court carefully analyzes this issue and notes that every Seventh Circuit case on point follows the majority position. *Tabor* also draws support for its reading from *In re Perkins*, 902 F.2d 1254, 1256 n.1 (7th Cir. 1990). *But see Morter v. Farm Credit Servs.*, 937 F.2d 354 (7th Cir. 1991) (rejecting *Goff*'s conclusion that § 541(c)(2) refers only to traditional spendthrift trusts, but not mentioning ERISA).

[4] A spendthrift trust is "[a] trust in which by the terms of the trust or by statute a valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary is imposed." Restatement (Second) of Trusts § 152(2) (1959).

controls the plan. We are unconvinced. Reed's situation resembles the facts before the Bankruptcy Appellate Panel in *Kaplan*. *Kaplan* involved a debtor physician employed by his own medical corporation and who acted as beneficiary, named trustee, and administrator of its ERISA qualified pension plan. In light of Kaplan's multiple roles, and his control over the funds in question, the panel found that his pension plan was not a valid spendthrift trust. *Kaplan* at 578. Like Kaplan, Reed, as the sole shareholder of his professional corporation, is actually self-employed and in fact exercises unrestricted control over the funds. We note in particular that Reed took an unsecured personal loan of over $100,000 from the plan (which has not been repaid); this indicates that Reed controls the funds as well as demonstrates that the pension is not sufficiently restricted to qualify as a spendthrift trust.[5] We therefore find that Reed's pension plan is not a valid spendthrift trust.

CONCLUSION

In sum, we hold that Reed cannot shield his pension plan assets from his bankruptcy estate. We find that ERISA § 514(a) preempts A.R.S. § 33-1126(B); that under Bankruptcy Code § 522(b)(2)(A) neither the state statute nor ERISA qualifies as "other federal law"; and finally, that Bankruptcy Code 541(c)(2) is unavailing both

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[5] Reed's contention that his ex-wife may have an interest in some funds from the plan does not significantly diminish his control over it.

because ERISA does not qualify as "applicable non-bankruptcy law" under that provision, and because Reed's ERISA qualified pension plan does not constitute a valid spendthrift trust.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re ELDON S. REED, Debtor. ELDON S. REED, Appellant, v. VICTORIA C. DRUMMOND, Appellee.	NO. 90-15874 USDC NO. CIV-90-0013 PHX RCB BK-88-3890 PHX RGM ORDER (Filed April 2, 1992)

Before: D.W. NELSON, HALL and FERNANDEZ, Circuit Judges.

The motion for an order staying any further action on Appellant's petition for rehearing and suggestion for rehearing en banc is DENIED.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re ELDON S. REED, Debtor.	NO. 90-15874 CIV-90-0013 PHX RCB BK-88-3890 PHX RGM
ELDON S. REED, Appellant, v. VICTORIA C. DRUMMOND, Appellee.	

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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TABLE OF CASES AND AUTHORITIES

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Matter of Volpe, 943 F.2d 1451 (5th Cir. 1991) 3

I. Introduction

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, Appellant Eldon S. Reed hereby petitions the Court for a rehearing of the Opinion entered in this action on December 11, 1991, on the grounds that it was based, at least in part, upon *In re Daniel*, 771 F.2d 1352 (9th Cir. 1985), *cert denied*, 475 U.S. 1016 (1986) (hereinafter "*Daniel*"), a decision which has been undermined by subsequent United States Supreme Court decisions and which is inconsistent and in conflict with a growing body of authority in other Circuits. Appellant believes that this is an appropriate decision for rehearing *en banc* because this decision and *Daniel* directly conflict

with decisions of other Circuit Courts and substantially affect rules of national application in which there is an overriding need for national uniformity.

II. Argument

This Court based its decision primarily upon the precedent of two cases, *Daniel*, and *Pitrat v. Garlikov*, No. 90-15252 (9th Cir. Oct. 25, 1991) (hereinafter "*Pitrat*"). The *Pitrat* decision also was based primarily upon the *Daniel* decision. A Petition For Rehearing and Suggestion For Rehearing *En Banc* (the "*Pitrat* Petition for Rehearing") was filed in *Pitrat* on November 8, 1991.

In the *Pitrat* Petition for Rehearing, the applicants point out that in the six years since *Daniel* was decided, several developments have undermined the continued viability of *Daniel*. Additional developments since the *Pitrat* Petition for Rehearing have further undermined *Daniel*.

The United States Supreme Court has called into question the rationale supporting *Daniel* in *Guidry v. Sheet Metal Worker's National Pension Fund*, 110 S. Ct. 680 (1990) (hereinafter "*Guidry*"). In *Guidry*, the Court made it clear that ERISA provisions are superior to creditors' rights and that the ERISA anti-alienation provision is comparable to other federal anti-alienation provisions in the illustrative list included as a part of the legislative history to Bankruptcy Code § 522(b). The Supreme Court in *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989) (hereinafter "*Ron Pair*") also clarified a court's role in statutory construction by establishing the "plain meaning" rule. The "plain meaning" rule provides that if a statute is clear on

its face, the analysis stops at the clear meaning of the statute. *Ron Pair* and the "plain meaning" rule are in direct conflict with the statutory construction undertaken by this Court in *Daniel*.

In addition to the decisions by the Supreme Court undermining the viability of *Daniel*, four Circuit Courts recently have addressed issues considered in this decision, *Daniel* and *Pitrat* and have reached contrary conclusions. At least three Circuits have addressed directly the meaning of "applicable nonbankruptcy law" and have discarded the *Daniel* rationale in favor of the "plain meaning" rule provided for in *Ron Pair* thereby holding that ERISA is "applicable nonbankruptcy law." *See Velis v. Kardanis*, No. 91-5084, 1991 U.S. App. LEXIS 26809 (3rd Cir. Nov. 14, 1991) (hereinafter "*Velis*"); *In re Lucas*, 924 F.2d 597 (6th Cir. 1991); *In re Moore*, 907 F.2d 1476 (4th Cir. 1990). The *Velis* decision was not discussed or apparently considered by this Court in reaching its decision in this case.

The Fifth Circuit Court in two very recent decisions not cited in this decision held that ERISA does not preempt a state exemption statute. *See Matter of Volpe*, 943 F.2d 1451 (5th Cir. 1991); *In re Dyke* 943 F.2d 1435 (5th Cir. 1991).

The decisions of this Court have resulted in an unexpected windfall to creditors. Pursuant to ERISA, qualified pension plan benefits are protected from creditors. Creditors do not assess the credit risk posed by an individual borrower based on the individual's assets in a qualified pension plan because such assets are protected and held for the individual's retirement. An individual plans for

and anticipates these benefits for his or her retirement, and ERISA provides the protection for such anticipation. Yet, according to this Court's decisions, an individual forced to file bankruptcy is afforded less protection than he or she would receive outside of bankruptcy. In essence, creditors receive payment from a source they are otherwise not entitled to and knew was not available when assessing the risk of extending credit; the individual no longer has the retirement benefits he or she was anticipating. Such a result shifts the burden of financial support at retirement from the individual to the government which is contrary to Congress' intent.

There is a strong need for national uniformity in the protection of pension plan benefits. Congress saw this need when it created ERISA. The United States Supreme Court saw this need when it decided *Guidrey*. The Third, Fourth, Fifth and Sixth Circuits all saw the need to protect pension plan benefits in the decisions cited above. In light of this conflict of authority in an area that so clearly requires uniformity, this Court should reconsider its decision as out of step with the developing law and destructive of needed uniformity.

The current decision of this Court, as well as its decisions in *Daniel* and *Pitrat*, do not address Congress' policy goals of providing protection to pension plan assets as clearly expressed in the Bankruptcy Code, ERISA and the Internal Revenue Code. These cases do not harmonize federal bankruptcy law and ERISA law and undercut the purposes of ERISA. *See In re Kincaid*, 917 F.2d 1162, 1170 (9th Cir. 1990) (*Fletcher*, concurring). These decisions conflict with decisions by the Third, Fourth, Fifth and Sixth Circuits and are contrary to the rationale

expressed by the United States Court in *Guidry* and *Ron Pair*. For all of the above reasons, now is the appropriate time for this Court to reconsider *en banc* this decision as well as its decisions in *Daniel* and *Pitrat*.

III. Conclusion

For the reasons set forth in this Petition, Appellants respectfully request this Court to grant *en banc* reconsideration of this decision and overrule *Daniel*.

RESPECTFULLY SUBMITTED this 20th day of December, 1991.

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLAUDE PITRAT, Trustee; KENDRICK M. MERCER, P.C.; FIRST INTERSTATE LEASING SERVICE CORP. Movants-Appellees, v. RONALD S. GARLIKOV; REDA S. GARLIKOV, Respondents-Appellants.	No. 90-15252 D.C. Nos. CV-89-2102/ 2103-PGR
STANLEY W. FOGLER, Trustee: FIRST INTERSTATE LEASING SERVICE CORP.; KENDRICK M. MERCER, Movants-Appellees, v. RICHARD JAMES FLINDALL, Respondent-Appellant.	ORDER (Filed Feb. 5, 1992)

Before: CHOY and SNEED, Circuit Judges, and KELLEHER, District Judge.*

* The Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

The clerk shall stay the issuance of mandate in this appeal until further order of the panel of this court which has this matter.

Further action by the panel on the petition for rehearing and suggestion for rehearing en banc on this case is suspended until the Supreme Court decides *Shumate v. Patterson*, 943 F.2d 362 (4th Cir. 1991), *cert granted*, 60 U.S.L.W. 3447 (Jan. 21, 1992) (No. 91-913).

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re:	U.S. Court of Appeals
ELDON S. REED,	Docket Number: 90-15874
Debtor,	
	Lower Court Docket Number:
	CV-90-0013-RCB
ELDON S. REED,	
Debtor/Appellant,	BK-88-3890-PHX-RGM
vs.	MOTION FOR ORDER
VICTORIA C.	STAYING ANY FURTHER
DRUMMOND,	ACTION ON APPELLANT'S
	PETITION FOR REHEARING
Trustee/Appellee.	AND SUGGESTION FOR
	REHEARING *EN BANC*
	(Filed Mar. 9, 1992)

Eldon S. Reed, Appellant in these proceedings, hereby requests the Court for an Order staying any further action on Appellant's Petition for Rehearing and Suggestion for Rehearing *en banc* until the United States Supreme Court has decided the case of *Shumate v. Patterson*, 943 F.2d 362 (4th Cir. 1991), *cert. granted*, 60 U.S.L.W.

3447 (Jan. 21, 1992) (No. 91-913). The *Shumate* case addresses issues which are involved in this case before this Court.

WHEREFORE, Appellant respectfully requests that this Court enter an Order staying any further action on Appellant's Petition for Rehearing and Suggestion for Rehearing *en banc* until the United States Supreme Court has issued a decision in the *Shumate* case.

DATED this 6th day of March, 1992.

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SUBCHAPTER III

The Estate

SECTION 541 (11 U.S.C. § 541)

§ 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is –

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor

acquires or becomes entitled to acquire within 180 days after such date –

(A) by bequest, device, or inheritance;

(B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include –

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case; or

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status

or State licensure of the debtor as an educational institution.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law –

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent

of any equitable interest in such property that the debtor does not hold.

Bankruptcy Rule References: 1007, 6007 and 6008